

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13**

In the matter of:)	
)	
Portillo's Hot Dogs, LLC,)	
)	
Employer,)	
and)	Case: 13-RC-313847
International Association of Bridge,)	
Structural, Ornamental and Reinforcing Iron)	
Workers, AFL-CIO.)	
)	
Petitioner,)	
)	
and)	
)	
Arise Chicago,)	
)	
Intervenor.)	

PETITIONER'S POST ELECTION OBJECTIONS HEARING
BRIEF IN SUPPORT OF CERTIFICATION

NOW COMES the Petitioner, the INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL and REINFORCING IRON WORKERS, AFL-CIO, hereafter "Union" and submits its brief in support of certification and denial of Employer, PORTILLO'S HOT DOGS, LLC's, hereafter ("Employer"), post-election objections. In further support, the Union states as follows:

Introduction

The employees at Portillo's Hot Dogs, LLC took part in a valid, fair election on April 13, 2023 and chose to be represented by the Union by a majority vote. At no time did the Union commit any objectionable conduct as stated by the Employer including during the critical period. The Union did not promise green cards, citizenship or work permits to any employee of the Employer in exchange for a pro-Union vote or provide any tangible benefit to the employees in

exchange for a pro-Union vote. Despite allegations by the Employer of improper or objectionable promises made by the Union, the record is devoid of any evidence or testimony that the Union made such promises in exchange for pro-Union votes. The Employer called eleven (11) witnesses during the objections hearing, all of whom were subpoenaed, in an attempt to show objectionable conduct on the part of the Union. None of the witnesses credibly testified that the Union promised citizenship, green cards or work permits to the employees in exchange for a pro-Union vote during the election.

The Employer's case rests solely on hearsay testimony or multi-level hearsay testimony by a certain number of employees, all of whom work in the Quality Assurance Department of the Employer and all of whom were interviewed by Employer's counsel post-election. In each instance of alleged hearsay promises testified to by certain employees, the testimony was denied or refuted by the actual individual who was alleged to have made the statement. In addition, the Employer has failed to show that Arise is an agent of the Union or that it had actual or apparent authority to act on behalf of the Union. Even if Arise made certain statements to the employees over the course of time, all statements were protected speech identifying the employees' rights and referencing the Department of Homeland Security's Deferred Action Program, and those statements were made prior to the "critical period".

- 1) The Union did not commit any objectionable conduct during the critical period and the Employer has failed to demonstrate or prove any objectionable conduct on the part of the Union that would require a new election.

It has been long established that the Board will not set-aside an election solely because of misleading campaign statements or misrepresentations of fact. See *Shopping Kart Food Mkt.*, 228 NLRB 1311, (1977) upholding the *Hollywood Ceramics* standard. The Board has found that employees are in a better position than the Board to judge the truth or falsity of campaign

statement. The Board should only intervene in instances where “a party was engaged in such deceptive practices as improperly involving the Board and its processes,” or where forged documents were used. *Shopping Kart*, *supra* note 64 at 1313. Union promises of benefits have customarily been considered part of the give-and-take of campaign propaganda and not legally objectionable. *Shirlington Supermarket*, 106 NLRB 666, (1953). Employees are generally able to understand that a Union cannot obtain benefits automatically by winning an election. The Board has been unwilling to set aside an election because a union promised benefits, but it has done so in the uncommon situation in which a union promises a significant benefit that was within its power to confer. See *Alyeska Pipeline Service Co.*, 261 NLRB 125, (1982).

The National Labor Relations Act forbids a union from “both blatantly giving something of value to an employee in exchange for his vote as well as offering a benefit in a way that ‘tacitly obliges the employee’ to vote for the union.” *Jam Productions*, 893 F.3d at 1044 (quoting *Freund Baking Co. v. NLRB*, 165 F.3d 928, (D.C. Cir. 1999)). Therefore, “[i]n considering whether a particular incentive taints the fairness of the election, we ask whether what is offered is ‘sufficiently valuable and desirable in the eyes of the person to whom they are offered, to have the potential to influence that person’s vote[.]’” *Id.* (quoting *NLRB v. River City Elevator Co.*, 289 F.3d 1029, 1033 (7th Cir. 2002)). That said, Congress has entrusted the National Labor Relations Board with “wide discretion to ensure the fair and free choice of bargaining representatives.” *NLRB v. Savair Mfg., Co.*, 414 U.S. 270 (1973) (quoting *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, (1969)). So, when a party objects to a union representation election, the Board bears initial responsibility for investigating and determining whether the complained of conduct substantially impaired the exercise of free choice such that a new election must be held. *River City Elevator*, 289 F.3d at 1032.

In the instant matter, the Employer has failed to show that the Union committed any objectionable conduct, made promises of benefits, or that it could deliver the benefits the Employer alleges that the Union made to overturn the election. The only representative of the Union to testify during the hearing was Mr. Hank Hunsell, an employee of the Union, (Dep. P.14, Line 6). Mr. Hunsell categorically denied that he or the Union made any promises to the employees of the Employer at any organizing meeting including during the critical period. Page 26-27, Lines 23-25, 1-3. Mr. Hunsell further testified that the Iron Workers never spoke about El Milagro, never heard Arise speak about El Milagro, never heard anyone at any meeting say “After we get the Union in, we can get work permits,” and never heard Arise promise to get two year work permits. See Page 23 Lines 19-25, and Page 27, Lines 1-14.

The Employer offered no testimony supporting the allegations against the Union or showing that the Union made any promises, material or otherwise, for a pro-Union vote, to sustain its objections to the election at any point in time, including the critical period. None of the eleven (11) witnesses presented by the Employer at the hearing stated, indicated, or testified that the Union promised work permits, green cards or work authorization permits or other benefits in exchange for a pro-Union vote. A close review of the testimony shows that all of the Employer’s evidence and allegations against the Union is based on hearsay testimony or finger pointing at Arise Chicago. No one ever implicated or testified that the Union promised a benefit to the employees in exchange for a pro-Union vote. The best the Employer could muster is testimony from Mr. Fernando Medina that he thought some individuals at a meeting held at a McDonalds in February 2023 worked for the Union and Arise Chicago in which work permits were discussed. P. 49, Lines 4-25, P. 50 Lines 1-2, 21-25. However, Mr. Medina indicated that

those words were spoken by Ms. Laura Garza, who is and always has been an employee of Arise Chicago. P.29, Lines 17-18.

Even assuming *arguendo* that some third-party conduct can be imputed onto the Union, the Union could not and was never able to provide work permits, green cards or citizenship to any employees of the Employer. This fact was recognized by the employees who testified, including Mr. Alexis Martinez, who testified that he was shocked that a promise of work permits was made and testified that the Union could not make such a promise. P. 70, Lines 12-23. Ms. Alma Garcia also testified that it was not possible for the Union to provide work permits. P. 84, Lines 2-6, and Ms. Guadalupe Rivera also testified that the Union could not provide work permits. P. 89, Lines 2-16. Benefits such as green-cards, work-permits or citizenship are benefits that the Union could never provide and has never been in its power to confer. The Employer has offered nothing to show that the Union offered or conferred a substantial, direct, and tangible benefit on employees such that their vote would be influenced. See *NLRB v. VSA, Inc.*, 24 F. 3d 588, (4th Cir., 1994), where the court stated that in order for pressure or inducement to warrant setting aside an election, it must lead to the “the failure of those in the bargaining unit to make their collective desires effective.”

The Employer has failed to carry its burden of proof in this matter. They have failed to show that any promise was made by the Union or its representative, Mr. Hunsell, to the employees let alone any promise that would warrant setting aside the election. The Union made no objectionable promises, including ones related to obtaining green cards, work permits, or citizenship as claimed by the Employer. There was no objectionable conduct on the part of the Union during the campaign or critical period that would allow the Board to set aside the valid

election in favor of the Union. The Employer's objections are without merit and should be denied and the election should be certified in favor of the Union.

- 2) The Employer's objections are based on refuted hearsay testimony surrounding a vague benefit that the Union or Arise Chicago could never grant.

The Employer's alleged objections rest almost entirely on refuted hearsay testimony provided by five (5) employees, most whom work in the Quality Assurance department for Employer and all who were interviewed by the Employer after the election. Allegations made by the Employer over misconduct or alleged promises by the Union or Arise Chicago are solely based on hearsay testimony which was refuted by other witnesses.

Testimony provided by Mr. Fernando Medina shows that he met with the Employer three (3) times after the election. P. 47, Line 10. Mr. Medina testified that he had a conversation with Mr. Juan Diaz at work about work permits. P. 57, Lines 4-11, and Mr. Juan Hernandez. P. 58, Lines 9-19 and P. 59 Lines 4-14. However, in both instances, Mr. Medina was relaying hearsay testimony about what Mr. Diaz and Mr. Hernandez allegedly heard at a prior meeting with the Union. Mr. Medina's testimony was solely based on hearsay. Mr. Medina never attended the meetings Mr. Diaz or Mr. Hernandez allegedly referenced. P. 61. Lines 20-22. Furthermore, Mr. Diaz stated that he never spoke with Mr. Medina about promises of work permits allegedly made by the Union or Arise Chicago or any other employee about work authorization permits. P. 150, Lines 5-20. P. 151, Lines 17-25. Mr. Diaz also testified when asked about promises of work permits, "I never heard it." P. 151, Line 22-25. Mr. Hernandez also denied having ever spoken with Mr. Medina during the week of the election. P. 127, Lines 17-22 let alone speaking with him about promises of work permits.

Mr. Alexis Martinez a QA employee spoke with the Employer two times after the election. P. 66, Lines 5-7. Mr. Martinez also provided double hearsay accounts of what he heard

that the Union said during meetings from Mr. Medina. Mr. Martinez never attended any Union meetings. P. 69, Lines 18-19. Mr. Martinez further relayed hearsay testimony that Mr. Medina told him about what other employees said about the meeting. P. 67 Lines 12-17, P.68, Lines 1-7. P. 69, Lines 8-12. The only testimony that Mr. Martinez provided regarding alleged promises was based on hearsay testimony he heard from Mr. Medina, who was the Employer's main witness. Testimony that was refuted by Mr. Diaz and Mr. Hernandez.

Ms. Alma Garcia a QA employee met with the Employer after the election. Ms. Garcia testified that she met with employees Alexis Martinez, Roman and Lupe who all discussed work permits. P. 80, Lines 2-11. Ms. Garcia relayed information about what she heard from Ms. Laura Garza to those three employees about work permits. This testimony was refuted by Ms. Garza who testified that she never stated that Arise or the Union could obtain work permits for any employee employed at the Employer. P. 41, Lines 16-20, P. 42, Lines 2-5.

Ms. Guadalupe Rivera, a QA employee met with the Employer three times after the election. P.86, Line 24 and added additional hearsay testimony as to what she heard other employees talking about. Ms. Rivera testified that she heard Alexis (Mr. Martinez) talking about work permits promised by the Union. P. 89, Lines 4-16. As previously discussed, Mr. Martinez was relaying information he heard from Mr. Medina, about what Mr. Medina allegedly heard at a Union meeting. Ms. Rivera's testimony and anything related to work permits was entirely based on multiple-level hearsay. Her testimony should be entirely discounted as it is entirely based on hearsay. Moreover, she did not believe that the Union could deliver on the alleged promise because she understood that there was a specific process to go through. P. 89, Lines 4-8.

Ms. Liza Rodriguez, met with the Employer after the election. She testified that she overheard a conversation between Mr. Christian Ramos and Mr. Juan Mariaca. P. 95, Lines 17-22

and they discussed being offered work permits if the Union won the election. P. 96, Lines 9-17. Ms. Rodriguez relayed hearsay information in her testimony about what she heard Mr. Mariaca say to another employee about what was said at a meeting. Again, Ms. Rodriguez's testimony about work permits being offered is entirely based on hearsay. It is important to also note that Ms. Rodriguez testified that she never heard directly from the Union about a work permit. P. 98, Lines 19-21. Furthermore, Mr. Mariaca testified that he never had a conversation with Mr. Ramos in the breakroom or anyone else the week of the election. P. 159, Lines 12-23. Mr. Mariaca's testimony completely refutes Ms. Rodriguez's claims.

As discussed, the only testimony offered by the Employer in relation to promises of work permits that was not based on hearsay testimony was offered by Ms. Maria Cordova. Ms. Cordova testified that she heard Laura Garza say "that she could probably get us work permits, but she was very clear about saying probably." P. 117 Line 25, P. 118 Lines 1-2. Ms. Garza denied saying this to anyone. Even if this was said, Ms. Garza is not an employee of the Union and the Board has found that these types of promises to provide "legal papers" is not sufficient to overturn an election as it is a promise that could not be delivered by the Union and was not a tangible benefit. See *House of Raeford Farms, Inc.*, 317 NLRB 18. In rejecting the election objections and certifying the election, the Board in *Raeford Farms, Inc.*, Footnote 5, noted the nature of the sketchy hearsay testimony, it is impossible to say whether the statements made by an alleged "union representative" could have reasonably been construed as a promise that immigration work permits or similar documents would be obtained for the employees by the Union.

The Employer again has failed to meet its burden of proof and failed to show any objectionable statement or promises were made by the Union or Arise Chicago. All the evidence

presented by the Employer attempting to show that the Union or Arise Chicago made promises of work-permits to employees was based on hearsay testimony that was refuted by other witnesses.

- 3) Arise Chicago is not an agent of the Union and has no actual or apparent authority to act on the Union's behalf.

The Employer provided no evidence at the hearing to show that Arise Chicago is in any way, shape or form, an agent of the Union. As Arise Chicago is not an agent of the Union and did not have actual or apparent authority to act on behalf of the Union any testimony relating to alleged statements made by Arise Chicago or its representatives should be disregarded.

The burden of proving agency is on the party asserting it. *Cornell Forge Co.*, 339 NLRB 733, (2003). The Employer must show that the entity or person had actual authority to speak for the union or apparent authority. Apparent authority "results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe the principal has authorized the alleged agent to perform the acts in question." *Corner Furniture Discount Center, Inc.*, 339 NLRB 1122, 1122 (2003). "Either the principle must intend to cause the third person to believe the agent is authorized to act for him, or the principal should realize that his conduct is likely to create such a belief." *Id.*

The record does not demonstrate Arise Chicago had actual authority to speak for the Union. Testimony provided by Ms. Laura Garza shows that Arise Chicago is an independent 501(c)(3) not for profit organization that assists workers in all facets of employment. Ms. Garza was never, and is currently, not an employee of the Union. P. 43, Lines 4-8. Ms. Garza testified that Arise works with several unions to support workers. P. 30, Lines 3-17. The Employer introduced a Form 5500 from the Union indicating it provided donations to Arise Chicago over the years. Employer Exhibit 2. Such donations were classified as Contributions, Gifts, and

Grants. These types of donations do not make Arise Chicago an agent of the Union and do not demonstrate actual authority which would allow Arise Chicago to speak for the Union. There is no evidence in the record or testimony that Arise Chicago had or has actual authority to act on behalf of the Union. Both entities are completely independent of one another. The Union does not control Arise Chicago or direct any of its actions. There is nothing in the record to support an actual authority grant of agency.

Arise Chicago does not and did not have apparent authority to act on behalf of the Union. There was no testimony or evidence provided by the Employer that shows that any employee believed that the Union authorized Arise Chicago to act on its behalf or make promises of work authorization or work permits on the Union's behalf. The Union's conduct never created such a belief in the employees that Arise Chicago was its agent for any purpose. Employee testimony is clear that the employees were aware that Arise Chicago was separate and distinct from the Union and the individual who allegedly made promises of work authorizations worked for Arise Chicago and not the Union. Mr. Medina stated that Jorge Mujica, Margarita Klein and Laura (Garza) all worked for Arise. P. 49, Line 23. Ms. Garcia stated she attended meeting with Arise in February of 2023. P. 75, Lines 7-8 and that the three individuals named Mr. Jorge, Ms. Garza and Ms. Klein all worked for Arise. P. 81, Lines 1-5. She also testified that she knew Mr. Hunsell worked for the Iron Workers. P. 83, Lines 1-6. This testimony indicates Ms. Garcia knew the difference between Arise Chicago and the Union. Mr. Martinez and Ms. Rodriguez never attended any employee meetings so they could not offer any testimony as to the relationship between Arise and the Union. Ms. Cordova also testified that she knew the three individuals referenced throughout the hearing that the employees were meeting with were employed by Arise Chicago and not the Union. P. 118, Lines 3-4. Q: Who does Laura Garza work for... A:

Arise Chicago,” P. 119 Lines 5-7. She also indicated that Mr. Hunsell was not at a meeting where she heard someone talk about work permits. P. 124, Lines 20-21.

Throughout the hearing, the witnesses demonstrated a clear understanding of the difference between Arise Chicago and the Union. The witnesses also appropriately and accurately identified which individuals worked for Arise Chicago and who worked for the Union. Nothing the Union did or said would have led the employees to believe that Arise Chicago was the Union’s agent for any purpose or authorized to act on its behalf. The Employer did not introduce any evidence or testimony establishing that Arise Chicago was an agent of the Union. Any alleged promise made by Arise Chicago for work permits cannot be attributed to the Union. The Employer has not established the existence of an agency relationship and has not satisfied its burden to show the Union committed objectionable conduct or made promises sufficient to overturn the election.

- 4) In the Alternative any promise relating to work-permit made by a third-party in this matter is insufficient to overturn the election.

It is long settled that the Board will not set aside an election based on third-party conduct threats unless the objecting party proves that the conduct was “so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible. See *Mascotec North America, Inc.*, 356 NLRB 110, (2011) citing *Westwood Horizons Hotel*, 270 NLRB 802, (1984). Similarly, any promise made by a third party must be sufficiently valuable and desirable in the eyes of the person to whom they are offered, to have the potential to influence that person's vote. *Jam Productions*, 893 F.3d at 1044.

It is clear that in this matter, Arise Chicago made no threats to any party. There is no evidence or testimony supporting this theory and the Employer is not pursuing it. On the other side of the coin, there was no evidence or testimony provided that indicated that the alleged

promise of work permits or two-year work permits made by Arise Chicago were desirable or potentially influenced an employee's vote.

No witness indicated that the alleged promise by Arise Chicago of a two-year work permit had any influence on their vote. In fact, as previously discussed, most witnesses presented by the Employer indicated that they knew Arise Chicago or the Union could not provide work permits. Furthermore, no witnesses testified that the alleged promise by Arise Chicago of a two-year work permit influenced their vote in either direction. The record is bereft of any testimony or evidence showing that the alleged work permit promises made by Arise Chicago influenced a vote.

The Employer is also legally bound to check the documented status of an employee before they are employed. The Employer in this matter follows the law, as stated by Ms. Rivera. She, like other employees, was required to fill out an I-9 form before she could work for the Employer. P. 91, Lines 11-21. Therefore, any alleged promise made by Arise Chicago about two-year work permits would have no value to the employees who voted in the election or attended meetings with Arise Chicago or the Union, as the Employer had already verified their immigration/employment status prior to their being hired.

The record does not show that the alleged promise of a work permit made by Arise Chicago was sufficiently valuable or desirable to any party or that it potentially influenced an employees' vote. The Employer did not ask and there is no testimony regarding an employee being influenced by the Union based on an alleged promise of a work permit.

- 5) Both the Union and Arise Chicago had an absolute right to discuss the Deferred Action Program authorized by the Department of Homeland Security.

Union conduct to educate employees concerning their rights under labor laws remains protected and unobjectionable during the critical period before a representation election (as well

as before and after the critical period). Unions can inform employees about their rights, assist them in identifying violations, urge them to seek relief and even refer them to competent counsel without casting into question subsequent election results. *Stericycle, Inc.* 357 NLRB 61, citing *Central Hardware Co. v. NLRB*, 407 U.S. 539, 543 (1972).

The current policy in place between the Department of Homeland Security and the NLRB states generally that the NLRB through a representative Union may request Deferred Action as it relates to immigration for employees engaged in a labor dispute. Such policy is known to all parties in this matter and is outlined in Union Exhibit 3 and posted on the Department of Homeland Security's website. The Department of Homeland Security can issue discretionary grants of work permits of up to two years to individuals who are engaged in a labor dispute and who do not necessarily have authorization to work in the United States.

When viewed as a whole, all testimony elicited by the Employer relating to work permits had the same theme, a grant of two-year work permits or authorization. It is clear that those individuals who testified to any promise of a work permit made by Arise Chicago were confused or relaying Arise Chicago's statements about the Deferred Action Program. Ms. Garza testified that Arise Chicago spoke to the employees at multiple meetings about recent policies that the Department recently issued including Deferred Action. P. 35, Lines 13-22. P. 36, Lines 20-22. Testimony provided by Mr. Juan Hernandez Santoyo stated that he received information about the Deferred Action Program at a meeting with Arise Chicago. P. 133, Lines 12-15 that discussed workers' rights.

Arise Chicago at certain points in time discussed the Deferred Action Program with employees, which was and currently is in place, as it is their right under current labor law. Certain employees who were at those meetings when the program was discussed, may have

misconstrued the discussion or forgot over time what was said and discussed. It was not a promise of two-year work permits presented by Arise Chicago, but a discussion on the legitimate lawful program being offered by the Department of Homeland Security in conjunction with the NLRB. Arise Chicago and the Union had an absolute right to discuss the Deferred Action program with the employees, the program is not a promise for work permits rather one of many potential rights the employees may have.

Conclusion

The Employer has failed to meet its burden of proof that the Union committed any objectionable conduct or made any promises to the employees of work permits, green cards, or citizenship if they voted for the Union. There is no evidence that such promises were made by the Union and if they were, the employees recognized that the Union could not provide such benefits. All the Employer's alleged evidence of objectionable conduct by the Union is either hearsay or was rebutted by other witnesses. The Employer has failed to show that Arise Chicago is an agent of the Union. Even assuming that Arise Chicago is somehow an agent of the Union the promises had no value to the employees and did not entice any employee to vote for the Union. Arise Chicago, like the Union, did have the absolute right to discuss the Deferred Action Program which may authorize up to a two year work permit depending on individual circumstances.

There is nothing in the record that would allow the Board to overturn the results of the election. The Employer is grasping at straws and did not make any showing of wrongdoing or misconduct that would result in the election being rerun.

WHEREFORE, the Union respectfully requests that the Employer's Post-Election Objections be denied and the Election Results in Case No: 13-RC-313847 be certified in favor of the International Association of Bridge Structural Ornamental and Reinforcing Iron Workers, AFL-CIO.

Respectfully Submitted,
Attorneys for the Petitioner

/s/ Michael J. McGuire
Michael J. McGuire

/s/ Librado Arreola
Librado Arreola

Michael J. McGuire
Librado Arreola
Attorneys for the Petitioner
Marco, McGuire & Arreola, LLC
3447 N. Lincoln Ave.
Chicago, IL 60657
(773) 661-2361
mmcguire@mma.law
larreola@mma.law

CERTIFICATE OF SERVICE AND NOTICE OF FILING

Please be advised that I, Michael J. McGuire, an attorney, served the foregoing, Petitioner's Post Election Objections Hearing Brief on the parties indicated below via email, and also filed the Brief with the National Labor Relations Board through the Electronic Filing System on June 2, 2023.

Mr. Gregory H. Andrews
Ms. Sarah J. Gasperini
Jackson Lewis, PC
150 N. Michigan Ave., Suite 2500
Chicago, IL 60601
gregory.andrews@jacksonlewis.com
sarah.gasperini@jacksonlewis.com

Mr. David Huffman-Gottschling
Jacob, Burns, Orlove & Hernandez, LLP
1 N. LaSalle St., Suite 1620
Chicago, IL 60602
davidhg@jbosh.com

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

PORTILLO’S HOT DOGS, LLC,)	
)	
Employer,)	
)	
and)	Case No. 13-RC-313847
)	
)	
INTERNATIONAL ASSOCIATION OF)	
BRIDGE, STRUCTURAL ORNAMENTAL)	
AND REINFORCING IRON WORKERS,)	
AFL-CIO,)	
Petitioner,)	
)	
and)	
)	
ARISE CHICAGO,)	
)	
Intervenor.)	

EMPLOYER’S POST-HEARING BRIEF IN SUPPORT OF ITS OBJECTIONS
TO THE CONDUCT OF THE ELECTION

I. INTRODUCTION

The Petitioner, Iron Workers Union (“Iron Workers” or “Union”), bought and paid for more than just Spanish translators when it funded Intervenor, Arise Chicago, to the tune of \$130,000 since 2013. The testimony adduced at hearing clearly demonstrates that Arise acted as the apparent agent of Iron Workers when it led Portillo’s Addison workers to believe that they could secure work authorizations in exchange for the workers’ support for the Union. As explained by Laura Garza, Arise Worker Center Director, Arise “collaborated” with Iron Workers, with whom Arise shared a 14-year relationship, as Garza and her fellow Arise organizers encouraged Portillo’s employees to join the Union. Arise admitted that while it could not “guarantee” two-year work authorization permits, it “probably” could do for Portillo’s workers what Arise did for

workers at El Milagro where Arise claimed that it had obtained work authorization permits for employees. These repeated, and not at all subtle, promises by Arise started at the first organizing meetings, continued through the process of collecting signed authorization cards, and persisted through the eve of the election. The promises were never disavowed but only modified with “could not guarantee.”

The vote at Portillo’s Addison facility was a close one: the outcome turned on just four votes. The wide dissemination of this offer of benefits by Iron Workers’ apparent agent, Arise, before and during the critical period, destroyed the laboratory conditions necessary for a free and fair election. Indeed, Arise’s illegal acts interfered with the employees’ exercise of free choice to such an extent that they materially affected the results of the election. Accordingly, the standards in *Taylor Wharton* and *Stericycle* require that the election results be set aside and a new election conducted.

II. PROCEDURAL BACKGROUND

The Union filed the Representation Petition on March 10, 2023. On March 30, 2023, the parties entered into a stipulated election agreement for the following unit:

Included: All full-time and regular part-time Production Associates, Forklift Operators, HACCP Coordinators, FSQA Associate, Plant Mechanic, Crew Chiefs, and temporary employees in these classifications, employed by the Employer at its facility currently located at 380 S. Rohlwing Rd., Addison, Illinois.

Excluded: All other employees, salaried employees, office clerical employees and guards, professional employees and supervisors as defined in the Act.

The Region held the Election on April 13, 2023, at Employer’s Addison, Illinois facility. The results of the Election were 28 votes cast for the Union and 20 votes cast against the Union, with zero challenged ballots.

On April 19, 2023, Employer timely filed its Objections to the Conduct of the Election, asserting as follows:

OBJECTION NO. 1

**The Union Promised Employees Work Permits, Green Cards, and Citizenship
in Exchange for their Vote and for Joining the Union**

During the critical period preceding the Election and/or during the Election, the Union, through its officers, employees, agents, authorized representatives and others acting on its behalf and/or with its apparent authority, actual or implied endorsement or ratification, promised voting unit employees on multiple occasions that: (a) the Union would give two-year work permits for employees if the Union was voted in; (b) if employees joined the Union then they could qualify for getting a two year work permit and the Union would help them get the permits; (c) the Union would provide employees with green cards in exchange for voting “Yes”; (d) employees could become American citizens if they voted “Yes” to the Union; and (e) the Union and Arise were already submitting for work permits for employees who attended the Union meeting.

On April 25, 2023, the Region issued an Order Directing Hearing and Notice of Hearing on Employer’s Objections, setting a hearing for May 4, 2023. The hearing was subsequently rescheduled to Thursday, May 11, 2023. On May 8, 2023, Arise Chicago moved to intervene under Section 102.65(b) of the Board’s Rules and Regulations. The Region granted Arise’s motion, and the parties proceeded to hearing before Hearing Officer Lee on May 11 and May 23, 2023.

III. FACTS

A. Arise received \$130,000 from the Iron Workers Union.

Though International Iron Workers organizer, Hank Hunsell, who worked with Arise to organize Portillo's workers, testified that he was unaware of payments from the Iron Workers to Arise (16:23-25; ER. Exs. 1, 2¹, Laura Garza, Arise's Worker Center Director, admitted that Arise has received a total of \$130,000 from the Iron Workers union since 2013. Garza further admitted that in November of 2022, Arise received \$10,000 from the Iron Workers. 32:25 – 33:10; ER Exs. 1, 2.

B. Collaboration between Arise and the Union.

Garza, a former organizer for Service Employees International Union, explained that in her current role as Director of the Worker Center at Arise Chicago, she helped organize the employees at Portillo's. 33:25 – 34:9. Garza testified that she attended the organizing meetings with the Iron Workers and Portillo's employees and encouraged the Portillo's employees to join the Union. 40:23 – 41:12.

Garza further testified that after Arise held its first meeting with Portillo's workers in late January of 2023, Arise "made contact with the Iron Workers . . . C.J. Hawking, who was our Executive Director, contacted Iron Workers at some point." 38:6-13. According to Garza, Arise and the Iron Workers had a 14-year relationship. 36:4-6.

Portillo's employee and eligible voter, Fernando Medina ("Medina"), testified that at the union meetings he attended, individuals from Arise were present. 49:12-13; 51:17 – 52:12; 56:4-

¹ Record citations refer to the Official Report of Proceedings before the National Labor Relations Board concerning the hearing on Employer's Objections to the Conduct of the Election held on May 11 and May 23, 2023. The transcript from May 11, 2023's in person hearing is incorrectly marked as a May 12, 2023 zoom hearing. Employer exhibits are cited as "ER Ex. _" and Union exhibits are cited as "UN Ex. _."

9. In response to the Hearing Officer's question about the Arise team of organizers, Jorge Mujica, Laura Garza and Margarita, "Do they work for the Union?" Medina replied, "I think so." 49:25 – 50:2.

C. Arise Chicago encouraged Portillo's employees to organize.

Garza testified that she helped organize the meetings in February for Portillo's workers 31:9–11. At the meetings with the Iron Workers and Portillo's employees, Garza "encouraged people to join the Union." 41:7-12. When asked whether Garza heard Arise Organizer Jorge Mujica, say at a meeting with Portillo's employees, "Let's sign these cards," Garza testified, "I don't recall." (39:16-18). Later, she stated, "I think what I said, is that we helped organize workers and . . . we did interpretation for the Iron Workers. We – we – mostly that, and we talked about the points of being union and the protections, and what it meant to be union, yes." 40:25 – 41:6. Notably, Hank Hunsell admitted during his testimony that he used a translator to talk with Portillo's workers. 25:7-8. Hunsell's translator was Sergio Robles, an Iron Workers employee. 26:17-18. In addition, someone from Arise translated for Hunsell at times. 26:21-22.

Medina testified that at a March 9 Union meeting held at a church in Addison, Illinois, Jorge Mujica from Arise said, "it was a better future for us with the Union." 54:14-20; 56:4-11. Medina testified that Laura and Margarita from Arise said "the same thing." 56:13–16.

Portillo's employee and eligible voter Juan Hernandez Santoyo ("Santoyo"), testified that he received Union Exhibit 1 during a meeting at the church but could not remember who gave it to him. 134:3-14. Union Exhibit 1 is written in Spanish with Arise Chicago's address and letterhead. Translated by the NLRB interpreter, the document states in part:

The labor laws guarantee and protect the right to form or join a union
in the United States, with or without immigration papers.

The union is simply an organization to negotiate among everyone about how things are going to work, instead of the employer deciding everything. With a union, working conditions can change in things like hygiene, safety, work shifts, and above all, respect all workers must receive.

If you are interested in trying to form a union in your workplace, call the Arise Chicago Workcenter, and we will help you see if this is possible, and we will put you in contact with any union in your area.

136:6-17; UN Ex. 1.

D. Arise Chicago offered two-year work permits in exchange for Union authorization cards.

Garza testified that she brought up the topic of Department of Homeland Security (“DHS”) protections for immigrant workers at the very first meeting with Portillo’s employees. 41:15 – 42:5. “[W]e say there are new policies, and if – if there is a way that those policies could be used, and they are used, and when they can’t, they can’t be used. There are no guarantees that you get citizenship. There are no guarantees that you would get a work permit at the end of anything. We – we don’t make those guarantees to workers at all.” 41:24 – 42:5. Garza also testified that she raised the subject of “deferred action of labor enforcements” with Portillo’s employees at meetings in February. 35:13-22.

Garza initially testified that she talked about what happened with El Milagro with employees when she met with Portillo’s employees in late January or early February. 38:19-23. On cross-examination by Arise’s own attorney, Garza emphasized that despite bringing up the subject of what Arise had done for El Milagro employees, when she first spoke with Portillo’s employees, she denied making any offer to help “individual employees” at Portillo’s. 43:15-20.

Medina testified that Garza said at a meeting with Portillo’s employees held at McDonalds, “[I]f there was a union to come in there, there could be the possibility of there being work

authorization for two years.” 50:21 – 51:3. There were 20 to 25 Portillo’s employees present at the McDonalds meeting, along with Garza, Jorge Mujica and Margarita from Arise. 50:4-20.

Alma Garcia, Portillo’s employee and eligible voter, testified to attending a union meeting at a church on about February 15th, with around 15 Portillo’s employees present, along with Laura [Garza], Jorge [Mujica] and Margarita from Arise. 76:19 – 77:9. According to Garcia, at this meeting, Laura [Garza] “gave an example of [El] Milagro, that they had helped them, and that they could help us, too, in the same way it had helped them. They were in the process of DACA.” 77:13-17.

Garcia attended a third meeting at the church where she heard Garza state “that they were going to give us a work permit for two years” and further, “that after we won, then the process for the work permits would start.” 78:6-15. Garcia testified that Hank Hunsell attended this third meeting. 78:21-24.

Santoyo also testified that speakers at the March meetings at the church spoke about El Milagro. 129:12-20. Santoyo testified further that he received Union Exhibit 2 (a press release from DHS written in Spanish) at a meeting with Arise, but he could not recall when or where he received it, and he did not recall anyone from Arise reviewing the document with him or any of the Portillo’s workers. 144:11 – 145:2. Significantly, Santoyo stated that he received Union Exhibit 2 from the Union at the church. 138:16 – 139:13.

E. Arise Chicago continued to offer two-year work permits during the Critical Period.

Maria Cordova (“Cordova”), Portillo’s worker and eligible voter, testified that she attended a March meeting at a church where Garza “clearly told” the Portillo’s employees present “that probably, but she wasn’t sure, she didn’t ensure us, that it depends on the situation that we were

working in, that she could probably get us work permits, but she was very clear about saying probably.” 117:22 – 118:2.

When asked how many Portillo’s employees heard Garza’s statement, Cordova testified that “it was almost all of us.” 118:6-8.

On redirect examination, Cordova made clear that the meeting where nearly all Portillo’s employees heard Garza’s promise of two-year work authorization permits was in March. 123:22 – 124:6. Cordova estimated that Portillo’s employees in attendance at this March meeting numbered about 38 to 40 people. 124:14-19. Cordova also testified that Hank Hunsell was not present at this meeting. 124:20-22.

F. Voters continued discussing Arise Chicago’s offer of work authorizations throughout the Critical Period.

Medina testified that on the morning of the election, he had a conversation with Santoyo, who “commented that the night before they had a meeting at church . . . if they voted and the Union won, then they would get a two-year work permission.” 58:16-19.

Medina also testified that the day of the election, he had a conversation with his coworker and eligible voter, Juan Diaz. 59:4-6. Diaz told Medina that, “[T]he night before they had a meeting at church where they had been told, that if we – you know, if we would, that if the [sic] voted and the Union won, then they would get a 2-year work permission.” 59:6-14.

Alexis Martinez (“Martinez”), another Portillo’s employee and eligible voter, testified that the week of the election, he had a conversation with his coworkers Medina and Garcia in the production area of the Addison plant where the topic of the union promises of work permits was discussed. 67:12 – 68:4. This conversation occurred on Tuesday, just two days before the election on Thursday, April 13, 2023. 68:12-16.

Garcia also testified to the conversation the week of the election stating, “I remember that they were going to give work permits. And they were very excited about that, and I said, ‘Oh yeah, I remember that they had said that at one of the meetings.’” 80:6-22.

Martinez testified that he was in a second conversation that same day, this time in the QA Room, with coworkers and eligible voters Guadalupe Rivera and Roman Barro, when the Union’s promise of work permits was discussed. 68:17 – 69:17.

Guadalupe Rivera (“Rivera”), also testified to the same conversation in the QA office the week of the election. 88:17 – 89:1. In reference to the discussion of the work permits, Rivera stated, “That’s something they can’t do. That’s not right. That’s illegal.” 89:13-16.

In addition, Liza Rodriguez (“Rodriguez”), Portillo’s employee and eligible voter, testified that during the week of the election she was in the breakroom where she heard Christian Ramos and Juan Mariaca (“Mariaca”) (both Portillo’s employees and eligible voters) engaged in a loud conversation, with Mariaca stating that “they were a team – if the team wins, that they were being offered a work permit.” 95:2 – 96:10. By “they,” Rodriguez stated Mariaca was referring to the “temporary workers.”² 96:11-14. Rodriguez added that there were about four Portillo’s employees present when Mariaca made this statement. 96:18-20.

IV. CREDIBILITY

The hearing officer’s credibility analysis may rely upon a variety of factors, including, but not limited to, the context of the witness testimony, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record. *Double D Construction Group*, 339 NLRB 303, 303-305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Lincoln-Mercury-Mitsubishi, Inc.*, 321 NLRB 586, 589

² Temporary workers are included in the unit description and were eligible to vote in the election.

(1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings regarding any witness are not likely to be an all-or-nothing determination, and a hearing officer may believe that a witness testified credibly regarding one fact but not on another. *Daikichi Sushi*, 335 NLRB at 622. The hearing officer should “not only pay careful attention to witnesses' substantive testimony, but also look for the specificity of the witness' testimony; how detailed it was; its vagueness...to what extent the witness' testimony contradicted documentary evidence or the testimony of other witnesses; and internal inconsistencies.” *Guide For Hearing Officers In NLRB Representation And Section 10(K) Proceedings*, September 2003, at page 168.

A. Hunsell's Testimony Was Not Credible.

Testimony that is evasive, contradictory, and self-serving should be discredited. *See, e.g., Reliable Electric Co.*, 330 NLRB 714, 721 (2000). In *Service Employees International Union Local 87 (GMG Janitorial, Inc.)*, 322 NLRB 402 (1996), the Board adopted the ALJ's findings which involved numerous credibility determinations. In that case, the ALJ largely made credibility determinations based on whether the witness' testimony was evasive and guarded versus candid and forthright. *Id.* at 408-413. Hunsell's repeated evasive testimony demonstrated a lack of credibility and should be discredited.

1. Hunsell offered unconvincing testimony that he was somehow unaware of his union's significant payments to Arise

Hunsell, employed by Iron Workers International as an organizer, admitted to attending many organizing meetings with Arise. Yet he claimed to have absolutely no knowledge of his union's substantial payments to Arise. First, he said he did not know.

Q. It is true isn't it, that Chicago District Council of Iron Workers paid \$10,000 to Arise in November of 2022?

A: I don't know.

14:13-17.

After being confronted with a LM-2 for the Chicago District Council of the Iron Workers reflecting a payment of \$10,000 from Iron Workers to Arise on November 9, 2022, Hunsell, despite working with Arise since February of this year, still claimed he was unaware of payments his union made to Arise.

Q: Is it your testimony that you are unaware that money had gone from the Iron Workers to Arise?

A: I -- I wasn't aware, no.

16:23-25.

2. Hunsell was evasive about how he knew where and when the meetings were to be held with the Portillo's employees.

Hunsell repeatedly refused to answer the question as to how he knew where and when to meet with Portillo's employees. Eventually, the Hearing Officer had to intervene and ask the question, and even then, Hunsell denied that he spoke with Arise to find out where and when the meetings with Portillo's employees would take place:

Q. And how did you know when to attend the meetings?

A. The workers set up the meetings.

Q. Did the workers call you?

A. I communicate with workers.

Q. Is it your testimony that you were never in communication with Arise as to where the meetings were going to take place?

A. They were at the same place.

Q. So, is -- is it your -- is it your testimony that -- that you would go through Arise to find out where the meetings were?

A. No. I mean, the -- the workers -- they met where the workers could meet and be comfortable.

Q. So, it is your testimony then -- at least to get an answer to this question, but you did not communicate to Arise to find out where the meetings were?

A. I know it's not your question, but are you saying that I take direction from Arise on where to do the meetings; is that what you are saying?

Q. That you communicated with someone from Arise as to

where the meeting was going to take place.
A. So, like that I -- like, for instance --

HEARING OFFICER LEE: Yeah, hold on -- hold on. Maybe I can clear this up a little bit. Did you communicate with anyone from Arise for these meetings?

MR. ANDREWS: Yeah, to find out when and where the meetings were going to take place.

THE WITNESS: Yeah, not for where and when.

21:20 – 22:23.

This testimony by Hunsell was evasive, when in response to the question, “How did you know where and when to attend the meetings, Hunsell answered, “The workers set up the meetings.” When next asked “Did the workers call you?” Hunsell answered, “I communicate with the workers.” This is inconsistent contrasted with the testimony of Garza, Director of the Arise Chicago Worker Center, who confirmed that Arise “made contact with” the Iron Workers. Garza testified:

Q. Was that the first meeting with Portillo’s employees in February?
A. No, we had a meeting with Portillo’s workers – I think it was the end of January, beginning of February, so sometime in February, we made contact with the Iron Workers.
Q So, when you say “we made contact,” can you explain that?
A. C. J. Hawking who was our Executive Director, contacted Iron Workers at some point.

38:4-13.

3. Hunsell repeatedly denied ever hearing references to El Milagro or work authorization permits.

Hunsell testified that he attended all the meetings (21:2-6) with Portillo’s employees, yet never heard any reference to El Milagro or work permits. (23:8-12; 23:19-25; 24:1-4; 26:23 – 27:14). In direct contrast to this testimony, Garza testified that she spoke about DHS policies and

“supporting employees if needed” (35:25 – 36:9), answered questions about DHS policies (37:16-19) and discussed El Milagro with Portillo’s employees. 38:19-23 Garza added that the El Milagro discussion was at a meeting where Hunsell was not present. 38:24-25. Yet, by his own admission, Hunsell claimed that he attended all of the meetings. 21:7-9.

Hunsell’s testimony was a textbook example of an evasive witness, and his claims that he never heard any promises made at the organizing meetings must be completely discounted as not credible.

B. Juan Diaz’s Testimony Was Not Credible.

Juan Diaz (“Diaz”), a Portillo’s employee and eligible voter received two subpoenas from the Employer to testify at the hearing. Diaz refused to come to the hearing on the first day, and when questioned about his absence, responded, “No one can force me to come. It just grew on me to come this time.” 149:18 – 150:3.

While testifying, Diaz had to be admonished by the Hearing Officer to just answer “yes” or “no” after giving long-winded and evasive answers to simple questions. 147:17 – 148:11. Even after the admonition, the Hearing Officer noted that Diaz was responding to something that was not asked and had to intervene and ask Diaz a series of questions simply to determine who from Arise was present at a meeting. 152:17 – 153:21.

Incredibly, despite the testimony of nearly all the other witnesses to the contrary, Diaz claimed he never heard anyone speak about El Milagro during the organizing campaign. 152:1-4. Contrary to Garza’s own testimony admitting she talked about El Milagro (38:19-23), Diaz denied that Arise spoke about El Milagro in the meeting at the church. Diaz’s testimony conflicted with the testimony of his two coworkers, Cordova and Santoyo, who both admitted there were

discussions about El Milagro during the meetings at the church in March and April. 117:11 – 118:5; 129:12-20.

C. Juan Mariaca's Testimony Was Not Credible.

The testimony of Mariaca, Portillo's employee and eligible voter, similarly lacked credibility. Mariaca testified that for the entire week of the election, he never spoke to any Portillo's employees in the break room, despite going into the room each day for his break. 159:21 – 160:13. This not only defies common sense, but it directly contradicts the credible testimony from witness Rodriguez, who testified that she heard Mariaca and Portillo's employee Christian Ramos engaged in a very loud conversation about work authorization permits in the break room on the Tuesday before the election. 95:2 – 96:20.

The Hearing Officer should disregard the testimony of Mariaca, Diaz and Hunsell due to the lack of credibility.

V. ARGUMENT

The facts demonstrate that Arise Chicago, as the apparent agent of the Iron Workers, made illegal promises to Portillo's employees leading up to the election. By making these promises in exchange for signed authorization cards and votes, Arise and the Iron Workers engaged in misconduct interfering with employees' freedom of choice that tainted the April 13th election. Accordingly, the results of that election must be set aside, and a new election held.

In determining whether a party's misconduct has the tendency to interfere with employees' freedom of choice, the Board considers the following factors: (1) the number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election; (5) the degree to which the misconduct persists

in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of conduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; and, (9) the degree to which the misconduct can be attributed to the party. *Taylor Wharton Harsco Corp.*, 336 NLRB 157, 158 (2001) The Board has held that no one factor is dispositive, but rather, it is a balancing test of all the factors. *Taylor Wharton*, 336 NLRB at 158.

The facts in this case establish that Arise Chicago is an apparent agent of the Iron Workers Union and offered to provide Portillo's employees with two-year work permits in exchange for union authorization cards and "yes" votes. Further, Arise widely disseminated this offer to all the eligible voters at Arise Chicago – Iron Worker Union hosted meetings. The heated discussions of employees about the offer of work permits in the days leading up to the election evidences the dissemination and its impact on voters. Arise Chicago's repeated reference to what Arise did at El Milagro, coupled with promises of two-year work permits for Portillo's employees, undoubtedly interfered with employees' freedom of choice and improperly influenced the election, requiring the results to be set aside, a new election held after a sufficient passage of time to erase the taint of the objectionable conduct, and ordering the Union and Arise to issue a written disavowal of their promise of two-year work permits (in Spanish and in English) to all voting unit employees.

A. Arise representatives are agents of the Union, and their misconduct must be imputed to the Union.

Arise representatives clearly functioned as agents of the Iron Workers in their organizing efforts with Portillo's employees. Section 2(13) of the Act provides that:

[I]n determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

29 U.S.C. § 152 (13). Rather, the Board applies common law principles when considering whether an individual is an agent of the union. *Bellagio LLC*, 359 NLRB 1116, 1117 (2013). Agency exists when there is apparent authority to act for the union. *See e.g., Bio-Medical of Puerto Rico*, 269 NLRB 827, 828 (1984) (finding apparent authority where the union allowed pro-union employees to speak on its behalf at meetings for unit employees). More specifically, “[a]pparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe that the principal has authorized the alleged agent to perform the acts in question.” *Bellagio, LLC*, 359 NLRB at 1117 quoting *Great American Products*, 312 NLRB 962, 963 (1993). “[E]ither the principal must intend to cause the third person to believe that the agent is authorized to act for him, or the principal should realize that this conduct is likely to create such belief.” *Id.* quoting *Service Employees Local 87 (West Bay Maintenance)*, 291 NLRB 82, 83 (1988) (citation omitted).

In *Bristol Textile Co.*, the Board found the union had given an employee apparent authority to act as its agent where the employee engaged in conduct holding himself out as a representative of the union to pass information to the eligible voters in the plant. The Board reasoned that:

although the Union did not designate [agent] its representative or pay him for his services, he nonetheless served as the Union’s presence within the plant. [Official] used him as a conduit between the Union and the employees, who perceived him to be the Union’s representative. For these reasons we find that the Union held out [agent] as its general agent.

277 NLRB 1637 (1986).

Moreover, the Board has found that a failure of the principal to disassociate itself from the actions of the alleged agent may be a controlling factor in determining agency. *La Famosa Foods, Inc.*, 282 NLRB 316, 328 (1986), citing *Bio-Medical of Puerto Rico*, 269 NLRB at 828. In *Bellagio*, the Board applied the above principles and concluded that a person not directly employed

by the union (a former employee) was a union agent. Among other factors, the Board observed that the former employee had asked to help the union with its campaign and attended a union meeting. 359 NLRB at 1117. According to the Board, the union representative should have recognized that, without clarifying why the former employee was present, employees would assume he was working with the union in its organizing effort. *Id.*

Similarly, in the instant case, Portillo's employees would assume Arise functioned as the agent of the Iron Workers. Indeed, it was Portillo's employee and eligible voter Medina's understanding. When asked by the Hearing Officer if the Arise organizers, including Garza, worked for the Union, Medina responded, "I think so." 49:25 – 50:1. The Union's own witness, Santoyo, testified that he received Union Exhibit 1 from Arise at an organizing meeting. Union Exhibit 1 is on Arise letterhead and very clearly encourages the workers to join the Union. The Director of Arise's Worker Center, Laura Garza, boldly testified that Arise received \$130,000 from Iron Workers since 2013, had a 14-year relationship with the Iron Workers, collaborated with the Union, and that she and her fellow Arise organizers encouraged Portillo's employees to join the Union. 32:5-6; 41:7-12. Garza further testified that Hunsell, the Iron Workers' organizer, did not attend all of the organizing meetings that Arise held with Portillo's employees. 38:19-25.

The facts demonstrate overwhelmingly that Arise is an apparent agent of Iron Workers. Thus, the words and action of Arise's team of organizers must be attributed to Iron Workers.

B. Through its agents, the Union destroyed the laboratory conditions necessary for a free and fair election by offering work permits in return for authorization cards and "yes" votes.

Both in the lead up to and after the filing the petition, the Union, by the conduct of its agent, Arise, promised employees two-year work permits in exchange for supporting the Union. These

bribes reveal a pattern of objectionable conduct on behalf of the Union that was widely disseminated and prevented a fair election.

1. Prepetition conduct was objectionable under the circumstances.

As a general matter, the Board views “the date of filing of the petition . . . [as] the cutoff time in considering alleged objectionable conduct in contested cases.” *The Ideal Electric and Manufacturing Co.*, 134 NLRB 1275, 1278 (1961). Nonetheless, the Board has consistently recognized exceptions to this rule, particularly for prepetition misconduct involving the solicitation of authorization cards. *See Gibson’s Discount Center*, 214 NLRB 221, 221 (1974) (prepetition offer to waive union fees, condemned by the Supreme Court in *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973), is “ground for setting aside an election”); *Lyon’s Restaurants*, 234 NLRB 178, 179 (1978) (union’s prepetition solicitation of authorization cards on the basis of a proscribed statement that employees had to join the union or they would not work was objectionable, noting that employees may well have believed the union had the power to affect their employment); *Royal Packaging Corp.*, 284 NLRB 317, 317-318 (1984) (prepetition statement to an employee that, if she and her daughter signed authorization cards, her daughter would be recalled from a six-month layoff was objectionable).

As in other cases where the Board has found prepetition conduct unlawful, the prepetition conduct here was key in obtaining employees’ signatures on authorization cards. And it is also clear from the record that the conduct “lingered” throughout the election process. *See Gibson’s Discount Center*, 214 NLRB at 222.

No evidence exists showing that the Union disavowed, clarified, or even attempted to disavow or clarify Arise’s misconduct before the election. *See e.g., Claxton Mfg. Co.* 258 NLRB 417, 417 (1981) (finding that a union’s letter to employees containing a guarantee that there would

be no initiation fees sent in an attempt to clarify an earlier objectionable statement was insufficient to remedy earlier conduct); *BCI Coca-Cola Bottling Company of Los Angeles*, 339 NLRB 67, 68 (2003) (overturning election where employer failed to disavow its prepetition threat to eliminate 401(K) benefits and engaged in conduct reinforcing employees' fears during the critical period).

In any event, "prepetition conduct adds meaning and dimension to related post-petition conduct." *Dresser Industries, Inc.*, 242 NLRB 74, 74 (1979); *see also Stevenson Equipment Company*, 174 NLRB 865, 866, n. 1 (1969). In *Cedars-Sinai Medical Center*, the Board relied on the union's prepetition threats to add meaning and dimension to post petition threats found objectionable, noting they were similar in kind and nature. 342 NLRB 596, 598 n. 13 (2004). The testimony of Garza, Medina, Cordova, Garcia, Rivera, Martinez, demonstrate that the pre-petition conduct continued and was the same as the post-petition conduct.

2. The Board has found promises of this nature objectionable.

By its overall conduct leading up to the election, the Iron Workers, through its agents at Arise, impermissibly used promises of work permits and work authorization to induce election votes for the Union. Garza testified that she introduced the topic of the Department of Homeland Security Memo and tied it to what Arise did for workers at El Milagro. 35:13 – 37:19. Garza was careful to testify that Arise could not guarantee work permits to Portillo's employees. *Id.* However, based on the credible testimony of nearly all the Portillo's employees who testified, the objective understanding of the Portillo's voting employees was that Arise was promising two-year work permits if the workers first signed authorization cards and then voted "yes" for the Union.

In *Stericycle, Inc.*, the Board held that a union engaged in objectionable conduct warranting a second election by financing a wage and hour lawsuit filed during the critical period. 357 NLRB

582, 583 (2011). Portillo’s employee and eligible voter Cordova testified to statements made by Garza in a meeting at the church in March, with nearly all the putative bargaining unit present:

Okay, so she told her – so she told us – so she told – she clearly told us that it was – that probably, but she wasn’t sure, she didn’t ensure us, that it depends on the situation that we were working in, that she could probably get us work permits, but she was very clear about saying probably.

117:22 – 118:2.

The qualifier of “probably” is not enough to disavow the promise of work permits made during the critical period to nearly every eligible voter. Just as in *Stericycle*, the late and far too subtle attempt at a disavowal was lost on the voters, evidenced by nearly all employees who testified referring to the repeated promises of work permits. As further evidence of the ineffectiveness of Garza’s use of the qualifier “probably,” witnesses described heated discussions on the topic of two-year work permits that continued unabated through the eve of the election.

Garza, anticipating being called out for offering legal services to eligible voters in return for authorization card signatures and “yes” votes, tried to distance herself from this obvious *quid pro quo* bargain by claiming that she was only informing workers of their rights under the recent DHS memo. Her effort to try to have it both ways failed miserably. First, by her own admission, she introduced the idea that Arise could do for Portillo’s workers what Arise had done for El Milagro workers. Second, the Union’s witness, Santoyo, testified and he did not recall anyone from Arise reviewing the document with him or any of the Portillo’s employees. 144:11 – 145:2. In an effort to fulfill the “collaborative” role between Arise and the Iron Workers and sign up more members for the Union that had paid Arise \$130,000, Garza took something that was intended to be a shield to protect marginalized and at risk workers and turned it into a sword. Hunsell admitted that he does not speak Spanish, and while he claimed to have attended all the meetings, this

testimony was directly refuted by every one of the witnesses, with all confirming that Hunsell was not at every meeting. Arise fulfilled its end of the bargain by not just providing translators, but organizers willing to make offers of gratuitous benefits to workers, first in return for authorization cards and then in return for union votes.

While not served up on the silver platter of a letter offering to finance a lawsuit, as in *Stericycle*, Arise's repeated promise during card signing and the critical period to provide two-year work permits, as Arise claimed it did for workers at El Milagro, is exactly the objectionable conduct that destroys laboratory conditions and warrants setting aside the election.

VI. CONCLUSION

The election held on April 13, 2023, must be set aside because Iron Workers, through its apparent agent, Arise, offered eligible voters two-year work permits in exchange for authorization cards and "yes" votes for the Union. This conduct started at the first organizing meeting and continued right up to the eve of the election. The promise was widely disseminated among the eligible voters and continued to be a topic of heated discussions among the voters throughout the critical period. The closeness of the vote shows that if only four voters changed their votes, the outcome would be different. The weak and disingenuous attempt by Arise to temper the repeated promises of work permits using the DHS memo and the qualifier "probably" did not undo the damage done by the repeated promises over the entire course of the organizing campaign. Accordingly, the appropriate remedy is to set aside the election, order a new election, and order the Union and Arise to issue a written disavowal of their promise of two-year work permits (in Spanish and in English) to all voting unit employees. The Employer also asks that in selecting the date for the new election, pursuant to Sec. 11284., "the passage of a significant period of time between the original election and the determination or direction of the rerun . . . be taken into

consideration.” National Labor Relations Board Case Handling Manual Part Two Representation
Case Proceedings Sec. 11452.1.

Dated: June 2, 2023

Respectfully submitted,
PORTILLO’S HOT DOGS, LLC

By: /s/ Gregory H. Andrews
Gregory H. Andrews
Sarah Gasperini
Jackson Lewis P.C.
150 North Michigan Avenue #2500
Chicago, IL 60601
(312) 787-4949
gregory.andrews@jacksonlewis.com
sarah.gasperini@jacksonlewis.com

CERTIFICATE OF SERVICE

Case Name: Portillo's Hot Dogs, LLC
Case No.: 13-RC-313847

I hereby certify that, on June 2, 2023, I caused a true and correct copy of the **EMPLOYER'S POST-HEARING BRIEF IN SUPPORT OF ITS OBJECTIONS TO THE CONDUCT OF THE ELECTION** in this case to be efiled with the National Labor Relations Board and served via email on:

National Labor Relations Board Region 13
Christopher Lee, Hearing Officer
Dirksen Federal Building
219 S. Dearborn, Suite 808
Chicago, IL 60603
Christopher.Lee@nlrb.gov

Counsel for Intervenor, Arise Chicago
David Huffman-Gottschling
Jacobs, Burns, Orlove & Hernandez LLP
One North LaSalle Street, Suite 1620
Chicago, IL 60602
davidhg@jbosh.com

Counsel for Iron Workers
Librado Arreola and Michael McGuire
Marco, McGuire & Arreola, LLC
3447 N. Lincoln Avenue
Chicago, IL 60657
larreola@mma.law
mmcguire@mma.law

PORTILLO'S HOT DOGS, LLC

By: /s/ Gregory H. Andrews

One of Its Attorneys

Gregory H. Andrews
Sarah J. Gasperini
Jackson Lewis P.C.
150 N. Michigan Ave., Suite 2500
Chicago, Illinois 60601
Telephone: (312) 787-4949
Gregory.Andrews@jacksonlewis.com
Sarah.Gasperini@jacksonlewis.com